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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RICKY MOSES EDWARDS, Defendant and Appellant.	E063316 (Super.Ct.No. FWV1302588) O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Mary E. Fuller, Judge. Affirmed.

Robert E. Boyce, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Barry Carlton, Deputy Attorney General, for Plaintiff and Respondent.

I

INTRODUCTION

A jury found defendant and appellant, Ricky Moses Edwards, guilty of the first degree, premeditated murder of Anthony Lucero (Pen. Code, §§ 187, subd. (a), 189),[1] and found that defendant personally and intentionally discharged a firearm causing Lucero's death (§ 12022.53, subd. (d)). The trial court sentenced defendant to 50 years to life in state prison: 25 years to life for the murder plus 25 years to life for the firearm enhancement. Defendant claims the judgment must be reversed due to "multiple instances" of prosecutorial misconduct. We find no prejudicial prosecutorial misconduct and affirm.

II

FACTUAL BACKGROUND

A. Prosecution Evidence

1. The Shooting

In July 2013, Michael Booth, Lucero, and Lucero's girlfriend, Kassandra Zuniga-Franklin (Zuniga), were homeless, using heroin on a daily basis, and staying in an abandoned house on Miramonte Street in Ontario. Zuniga and defendant had dated for several months during 2010. In February 2011, Zuniga gave birth to a daughter, S. Zuniga's mother, Tracy O., had custody of S.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

At 6:20 a.m. on Saturday, July 27, 2013, Booth, Lucero, and Zuniga were asleep in the front room of the house when they awoke to what sounded like firecrackers. Lucero and Zuniga had been sleeping on a sofa, and Booth had been sleeping on the opposite side of the front room. Someone fired three shots into the front room through a side window. The side window was broken and glass was shattered across the room. When he awoke, Booth looked at his watch and saw it was "exactly" 6:20 a.m.

Lucero "jumped up. [¶] . . . Onto his feet" and said he had been shot. One of the bullets grazed Lucero's right elbow and left palm, and another went through his upper right arm and right arm pit, entering his chest and piercing his heart and both lungs. Lucero died at a hospital at 7:15 a.m., 55 minutes after he was shot, as a result of internal bleeding. Two of the three bullets were recovered from the sofa where Lucero and Zuniga had been sleeping, and the third bullet was recovered from Lucero's body. Defendant was arrested for the murder of Lucero on July 31, 2013, four days after the shooting. During the investigation, no firearm was found.

Around 11:00 p.m. on July 25, 2013, two nights before the shooting, someone shone a flashlight through the side window through which the shots were later fired. Zuniga heard a man's voice outside, and saw that the man was wearing a hoodie, but she did not see the man's face. Booth heard a man "ranting" and pacing back and forth outside, but he did not see who the man was. Lucero went outside, offered the man a cigarette, and spoke with him. Booth overheard the man warn Lucero not to have Lucero's "homeboys" in the abandoned house. When interviewed by the police, Booth

and Zuniga told the police they did not know the identity of the man who was outside the side window on July 25.

2. The Neighbors' Testimony Identifying Defendant at the Scene

Vincent and Raquel Barton lived near the abandoned house. Around 6:15 a.m. on July 27, 2013, they came outside and walked to their car, parked in front of their house. Vincent was driving Raquel to work by 6:30 a.m., and Raquel was outside and waiting for Vincent when he came outside. It was a bright and sunny day.

After he came outside, Vincent saw a man he later identified as defendant get out of a white Nissan pickup truck, walk through the front gate of the abandoned property, and proceed toward the back of the property "like he knew where he was going." Raquel also saw the man, whom she later identified as defendant, and noticed he seemed familiar with the abandoned house. Raquel and defendant made eye contact and nodded at each other. Raquel was 30 to 40 feet away from defendant, "looked at him full in the face," and saw his face was "scrunched-up" and he seemed "upset." Defendant was dressed in black and wearing a "snowboard beanie," which Raquel thought was "odd" because it was hot outside. After defendant walked to the back of the abandoned house, he tried to open the back door. As Vincent and Raquel were driving away, defendant was walking toward the front of the house.

Celeste Cervantes lived next door to the abandoned house. After 6:00 a.m. on July 27, 2013, Cervantes heard gunshots, looked outside, and saw a man she later identified as defendant, wearing a gray sweatshirt and blue jeans shorts, running away from the

abandoned house. Cervantes went to her front door, looked outside in the direction defendant had run, and saw a white truck driving away. Cervantes was standing outside with her sister and father, "trying to figure out . . . what had happened," when Zuniga came to Cervantes's front gate and asked someone to call 911 because a person had been shot. Cervantes's sister called 911.

3. Motive Evidence

The prosecution claimed defendant had a motive to kill Lucero: defendant's belief that Lucero was preventing him from seeing his daughter S. and from rekindling his relationship with Zuniga.

On July 27, 2013, Zuniga told police that, earlier during 2013, the biological father of S., whom Zuniga said was a man named "Kid," got into a fight with Lucero. During the fight, Lucero gave Kid a black eye, and Kid threatened to kill Lucero if he ever saw him again. Zuniga also told police that Kid did not want Lucero to adopt or become a father figure to S., that Kid had been trying to rekindle his relationship with Zuniga, and Kid was angry because Lucero and Zuniga refused to let him see S. After she repeatedly denied knowing Kid's name, Zuniga told police that Kid's first name was Alfredo.

At trial in January 2015, Zuniga testified she did not know whether defendant was the father of S., but she acknowledged defendant believed he was the father. In October 2010, when Zuniga was pregnant with S., defendant wrote Zuniga a letter from prison in which he indicated he believed he was the father of Zuniga's unborn child and he wanted to support the child. At the time of trial, defendant had never met S.

According to Zuniga's mother, Tracy O., Zuniga was in regular contact with defendant in July 2013, and each time they had contact defendant would ask Zuniga where she was staying. Zuniga told Tracy O. that the voice of the man who shined the flashlight into the side window on July 25, 2013, sounded like defendant's voice, and Zuniga heard the man say, "You better get out of here, or else." Later during 2013, after Lucero was shot and killed, Zuniga told Tracy O. that Zuniga was still in love with defendant.

Tracy O. met defendant one time, before S. was born, when Tracy O. invited defendant to her house to dinner. On cross-examination, defense counsel asked Tracy O. whether it was true that she did not like defendant after meeting him that one time at dinner. Tracy O. responded she did not like any of the boys her daughters dated. When the prosecutor asked Tracy O. on redirect whether it was something defendant said during the dinner that caused Tracy O. to dislike defendant, Tracy O. responded "yes" and explained she did not like defendant because he "repeatedly" described himself as a gang member and talked about other gang members he hung out with.

On Wednesday, July 24, 2013, defendant told his friend Carolyn Hannifin that he had two children, he missed his children, and the boyfriend of the children's mother would not allow him to see his children. During the same conversation, defendant told Hannifin he would "take care of business" and made a gesture imitating a handgun. Defendant also mentioned to Hannifin that he had a gun. On July 31, 2013, Hannifin found a voicemail on her cell phone from defendant, saying he was in jail for murder, he

was innocent, and he was with Hannifin on Friday and Saturday, July 26 and 27, 2013. Hannifin denied she saw defendant at any time on Saturday, July 27.

4. Additional Prosecution Evidence

Around 12:30 p.m. on July 27, 2013, the white Nissan truck that the Bartons and Cervantes saw near the time of the shooting was found approximately two miles, or a five minute drive, away from the abandoned house. A surveillance video from a nearby shop showed an Hispanic man wearing a black T-shirt park the truck and walk away from it at approximately 8:40 a.m. on July 27, 2013, around two and one-half hours after the shooting. The truck was reported stolen at 11:08 a.m. that morning.

B. Defense Evidence

The defense claimed that the Bartons and Cervantes mistakenly identified defendant as the shooter, and also presented alibi evidence that defendant was in any one of three different places when the shooting occurred. Alternatively, the defense claimed that if defendant was the person who shot Lucero, he was, at most, guilty of voluntary manslaughter because the shooting occurred in the heat of passion.

1. The Eyewitness Identification Expert

Dr. Robert Shomer testified as an expert for the defense on various factors that reduce the reliability of eyewitness identifications. According to Dr. Shomer, an eyewitness's identification of a stranger is no more accurate than chance, and there is no relationship between a witness's confidence in the accuracy of their identification and its

accuracy. When, as in this case, the top of a person's head is covered, it decreases the accuracy of an eyewitness identification of the person.

2. Conflicting Alibi Testimony

Defendant's "best friend," Danielle Rivera, testified defendant was with her all of the time or "24/7" during July 2013. Defendant came to Danielle's house around 7:10 a.m. on Saturday, July 27, 2013, and stayed for the rest of the day. Defendant played "scratchers" and acted normally, then fell asleep. Danielle's mother, Pamela Rivera, testified that during July 2013 defendant spent a lot of time at her home, where Danielle also lived, and defendant would "come and go . . . at all hours of the day and night."

Defendant's uncle, Ralph Santellan, and aunt, Wanda Edwards, testified defendant was asleep on their couch on the morning of July 27, 2013. Santellan saw defendant at approximately 7:45 or 8:00 a.m. and Edwards saw defendant at approximately 5:30 a.m. on July 27. According to Edwards, defendant was still on the couch at 1:00 p.m., when Edwards was vacuuming.

Defendant's mother, Caroline Machado, testified that defendant had a girlfriend named "Josie" in July 2013. Josie Blanco testified she was defendant's girlfriend in July 2013 and defendant would come and go from her apartment in Highland. According to Blanco, defendant arrived at her apartment on his bike at approximately 11:00 p.m. on Friday, July 26, 2013, and left the apartment between 7:00 and 7:30 a.m. on Saturday, July 27. Between 4:30 a.m. and 6:00 a.m. on July 27, defendant was absent from the apartment for approximately seven minutes to run an errand for Blanco.

3. Additional Defense Evidence

Maria A. testified that she and defendant were the parents of a girl, C., born in 2006. Defendant helped Maria A. raise C. and Maria A.'s older son, J. According to Maria A., defendant was a good father to C. and J. Maria A. had never prevented defendant from seeing C. or J. and had never had a boyfriend who prevented defendant from seeing C. or J.

C. Rebuttal

In 2008, defendant pled guilty to felony child endangerment after C. and J. were found wandering near the street outside their home when they were two and three years old, respectively. Neither child was wearing pants or shoes. Defendant was supposed to be watching the children, but he was asleep and under the influence of alcohol and methamphetamine.

When interviewed by the police on July 31, 2013, Santellan said defendant did not live, stay, or have any permanent belongings at Santellan's home. Though defendant was allowed to visit Santellan's home, he was not allowed to stay the night there. Edwards told the police she had not seen defendant for approximately one month prior to July 31, 2013.

Danielle called the police on July 31, 2013, to say defendant was with her on Saturday night, July 27, after the shooting. Danielle hesitated before answering police questions. Danielle initially told the police that defendant was at her home at 6:00 a.m. on July 27, but when told the police had information that defendant was somewhere else

at that time, she changed her story and said she was uncertain whether defendant was at her home at that time. On August 1, 2013, Danielle did not appear for a police interview that she had scheduled, and when the police tried to call her after she failed to appear, her cell phone had been disconnected.

Blanco told the police she smoked methamphetamine daily and that she lied or "tr[ied] to cover" for another boyfriend who had beaten her because she did not want that boyfriend to go to prison. Blanco admitted to the police that she had spoken to defendant's mother, Caroline Machado, about the date and time defendant was accused of shooting Lucero.

III

DISCUSSION

Defendant claims the judgment must be reversed based on five specific instances of prosecutorial misconduct. He claims the prosecutor prejudicially erred (1) in asking Blanco whether a police detective lied when he wrote in his report that Blanco made certain statements to the detective, (2) in insinuating defendant had been in custody for 18 months while cross-examining Danielle, (3) in misstating the reasonable doubt standard during closing argument by equating it with "common sense," (4) in urging the jury, during closing argument, to imagine how Lucero suffered before he died, and (5) in disparaging defense counsel in rebuttal argument by suggesting counsel was fabricating a defense.

Alternatively, defendant claims his defense counsel rendered ineffective assistance in failing to object to any of these instances of prosecutorial misconduct, and any objections would have been futile. We consider each claim of prosecutorial misconduct on its merits. (*People v. Sanchez* (2014) 228 Cal.App.4th 1517, 1525; § 1259 [appellate court may address merits of claims not raised in trial court which affect the defendant's substantial rights].)

A. Applicable Law

"Under California law, a prosecutor commits reversible misconduct if he or she makes use of 'deceptive or reprehensible methods' when attempting to persuade either the trial court or the jury, and it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted. [Citation.] Under the federal Constitution, conduct by a prosecutor that does not result in the denial of the defendant's specific constitutional rights—such as a comment upon the defendant's invocation of the right to remain silent—but is otherwise worthy of condemnation, is not a constitutional violation unless the challenged action '"so infected the trial with unfairness as to make the resulting conviction a denial of due process."' [Citation.]" (*People v. Riggs* (2008) 44 Cal.4th 248, 298.)

"When a claim of misconduct is based on the prosecutor's comments before the jury, '"the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion."' [Citation.]"

(*People v. Friend* (2009) 47 Cal.4th 1, 29.) There is no requirement a prosecutor act intentionally to commit misconduct. (*People v. Hill* (1998) 17 Cal.4th 800, 822.)

B. Defendant's Claims of Prosecutorial Misconduct Lack Merit

1. Asking Blanco Whether Detective Wentz Was Lying

Defendant's girlfriend, Josie Blanco, testified for the defense that defendant was with her the night before and the morning of the shooting, and he did not leave her home until 7:00 or 7:30 a.m. on July 27, 2013, around one hour after the shooting occurred. On cross-examination, the prosecutor confronted Blanco with a statement she made to Ontario Police Detective Jeffrey Wentz, namely, that in the past she had lied to the police in order to cover for an ex-boyfriend who had beaten her so that her boyfriend would not go to prison.

After Blanco denied making such a statement to the detective, the prosecutor asked Blanco: "If Detective Wentz has that in his report, that would be a lie?" Blanco answered: "If that's what you want to call it, yes."

Later during her cross-examination by the prosecutor, Blanco denied admitting to the detective that she had spoken to defendant's mother about the date and time defendant was accused of shooting and killing Lucero. The prosecutor then asked Blanco whether the detective "would be committing perjury" if the detective "walked into this courtroom and told these jurors" that Blanco made the statement. Blanco answered: "Yes. Because I spoke to [defendant's mother] about the last time I seen [*sic*] [defendant]."

In rebuttal, the prosecutor called Detective Wentz, who testified Blanco admitted to him that she tried to "cover" for her ex-boyfriend who had beaten her because she did not want that boyfriend to go to prison, and Blanco also told the detective that she had spoken to defendant's mother about the date and time defendant was accused of shooting Lucero.

Defendant claims the prosecutor's "was Detective Wentz lying or committing perjury" questions to Blanco were improper and argumentative because Blanco did not know the detective and could have had no insight into whether he was lying, mistaken, or incompetent regarding Blanco's statements to him about "covering for" her ex-boyfriend and speaking to defendant's mother about the date and time defendant was accused of shooting Lucero. We conclude the questions were proper.

As defendant points out, the propriety of "were they lying" questions turns on whether the question seeks to elicit relevant, competent testimony, such as whether the witness has any knowledge of whether or why the other witness is or may be lying. (*People v. Chatman* (2006) 38 Cal.4th 344, 383-384 (*Chatman*).) Such "were they lying" questions "should not be permitted when argumentative, or when designed to elicit testimony that is irrelevant or speculative." (*Id*. at p. 384.) "An argumentative question is a speech to the jury masquerading as a question. The questioner is not seeking to elicit relevant testimony." (*Ibid*.)

The defendant in *Chatman* testified in his defense and doing so contradicted several prosecution witnesses who testified the defendant told them he stabbed and killed

the victim. (*Chatman, supra,* 38 Cal.4th at pp. 355-356, 377-378.) The prosecutor asked the defendant whether the prosecution witnesses were lying and what motives they would have to lie. (*Id.* at pp. 377-378.) The questions were proper, the *Chatman* court explained, because the defendant "had personal knowledge of the conversations he had with the other witnesses, and they were all friends or relatives. He could provide relevant, nonspeculative testimony as to the accuracy of their information and any motive for dishonesty." (*Id*. at p. 383.) Regarding whether any of the witnesses harbored any biases which might motivate them to lie, *Chatman* concluded that, "[a]t least when, as here, the defendant knows the witnesses well, we think questions regarding any basis for bias on the part of a key witness are clearly proper." (*Ibid*.)

Chatman discussed this court's decision in *People v. Zambrano* (2004) 124 Cal.App.4th 228, 241-242, where we held it was misconduct for the prosecutor to ask the defendant whether two police officers were lying in every aspect of their testimony that differed from the defendant's testimony, in order to force the defendant to call the officers liars and thus inflame the passions of the jury. (*Chatman, supra,* 38 Cal.4th at pp. 381-382.) As *Chatman* explained, the prosecutor's questions to the defendant in *Zambrano* "called for irrelevant and speculative testimony. It was clear that the defendant was testifying to a diametrically different set of circumstances from that recounted by the officers. The differences could not have been attributed to mistake or faulty recall. The defendant, a stranger to the officers, had no basis [or] insight into their bias, interest, or motive to be untruthful. . . . [The prosecutor's questions] 'merely forced

[the] defendant to opine without foundation, that the officers were liars.'" (*Chatman*, *supra*, at p. 381, quoting *People v. Zambrano*, *supra*, at p. 241.)

Defendant notes that here, as in *Zambrano*, Blanco "was a stranger" to Detective Wentz and had no insight into whether the detective had any bias, interest, or motive to lie about what Blanco told the detective. But here, the prosecutor did not ask Blanco whether Detective Wentz had any reason to lie about what Blanco told him. Indeed, Blanco had no apparent insight into *why* the detective might lie. Instead, the prosecutor only asked Blanco *whether* the detective was lying, or would be committing perjury, if he were to testify that (1) Blanco *told the detective* that she had lied to the police to "cover for" her ex-boyfriend who had beaten her, and (2) Blanco *told the detective* that she had discussed with defendant's mother the date and time defendant was accused of shooting and killing Lucero.

Blanco plainly had personal knowledge of what she told the detective during her discussions with the detective. Because the prosecutor's questions called for Blanco to give competent, admissible testimony on whether she or the detective was telling the truth about what she told the detective, the questions did not constitute misconduct. "'A defendant who is a percipient witness to the events at issue has personal knowledge whether other witnesses who describe those events are testifying truthfully and accurately. As a result, [the witness] might also be able to provide insight on whether witnesses whose testimony differs from his own are intentionally lying or are merely

mistaken.'" (*People v. Tafoya* (2007) 42 Cal.4th 147, 178, quoting *Chatman*, *supra*, 38 Cal.4th at p. 382; accord, *People v. Hawthorne* (2009) 46 Cal.4th 67, 98.)

2. Suggesting Defendant Had Been in Custody for 18 Months Awaiting Trial

Pamela Rivera testified that defendant's nickname was "Ghost" and she did not recall whether he ever said he was also known as "Kid." On cross-examination, the prosecutor asked Pamela whether defendant's nickname was Ghost because he looked like or acted like a ghost, and Pamela responded it was because of "[t]he color of his skin." On redirect, defense counsel asked Pamela whether she thought defendant "stood out" in the six-pack photographic lineup shown to other witnesses, and Pamela answered that defendant had a "way lighter" complexion than the other five subjects in the lineup. When defense counsel next asked Pamela whether she had ever seen the other five subjects in the lineup, the court sustained its own relevance objection. By that question, defense counsel was ostensibly attempting to show the photographic lineup was impermissibly suggestive because defendant had a far lighter complexion than the five other subjects in the lineup.

On recross-examination, the prosecutor attempted to elicit testimony from Pamela that defendant's complexion would have been darker at the time of the photographic lineup in 2013 than at trial in 2015. The following colloquy occurred:

"[PROSECUTOR:] Ms. Rivera, would you say that the defendant is lighter in complexion today than the last time you saw him a year-and-a-half ago?

"[PAMELA:] Same. The same.

"[PROSECUTOR:] Okay. You don't think being indoor[s] for a year and a half—

"[DEFENSE COUNSEL]: Objection. Asked and answered.

"THE COURT: Overruled.

"[PROSECUTOR:] You think after being indoors for a year-and-a-half, he doesn't look any lighter than a year-and-a-half ago?

"[PAMELA:] Looks the same to me."

Defendant claims the prosecutor's question about defendant being "indoors" for 18 months improperly directed the jury's attention to defendant's custodial status, was argumentative, and was not designed to elicit any relevant testimony. Defendant relies on *Estelle v. Williams* (1976) 425 U.S. 501, 503-505, where the high court held that an accused must not be compelled to stand trial in jail clothing because it may impair the presumption of innocence and accordingly deprive the defendant of his due process right to a fair trial. (*People v. Taylor* (1982) 31 Cal.3d 488, 494 ["The Supreme Court has observed that the defendant's jail clothing is a constant reminder to the jury that the defendant is in custody, and tends to undercut the presumption of innocence by creating an unacceptable risk that the jury will impermissibly consider this factor."].) *Estelle* and *Taylor* are inapposite because defendant was not forced to wear jail clothing during trial.

The prosecutor did not commit misconduct in asking Pamela whether defendant "looke[ed] any lighter than a year-and-a-half ago." First, the question did not refer directly to defendant's custodial status or tell the jury defendant had necessarily been in

custody, including in protective custody. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1335 [no misconduct where prosecutor did not refer expressly to the defendant's custodial status].) The question sought to elicit admissible testimony from Pamela that defendant's skin color was lighter at trial than it was 18 months earlier, when Pamela last saw defendant. As such, the question properly sought to refute defense counsel's suggestion that the photographic lineup was impermissibly suggestive because defendant's skin color was lighter than the other subjects in the lineup.

Further, the prosecutor's isolated, oblique suggestion that defendant had been in custody for 18 months could not possibly have prejudiced defendant. Defendant was charged with first degree murder, and the jury heard defendant was in custody for the charge when it heard defendant called Hannifin from jail following his July 31, 2013, arrest for the murder. (*People v. Bradford*, *supra*, 15 Cal.4th at p. 1336 ["[A]n isolated comment that a defendant is in custody simply does not create the potential for the impairment of the presumption of innocence that might arise were such information *repeatedly* conveyed to the jury," and in some cases the jury inevitably will learn that the defendant is in custody].)

3. Alleged Misconduct During Closing and Rebuttal Arguments

Defendant next claims the prosecutor erred during his closing arguments by (1) conflating the reasonable doubt standard with "common sense," (2) urging the jury to imagine Lucero's last moments of life, and (3) disparaging defense counsel.

(a) *The Reasonable Doubt Standard and Common Sense*

During closing argument, the prosecutor discussed the "tools" the jury had been given to decide the case. After telling the jury it could use the testimony, exhibits, and jury instructions, the prosecutor said: "Most importantly, you have common sense. Because that's what it boils down to in this case: Common sense. You got two eyewitnesses who saw the defendant poking around the scene of the murder immediately before the murder. The third puts him running away immediately after and you got motive like crazy. Common sense. It's proof beyond a reasonable doubt."

Defendant claims this argument misstated the law and lowered the burden of proof by conflating the reasonable doubt standard of proof with "common sense." We disagree with defendant's interpretation of the prosecutor's argument.

"'Although counsel have "broad discretion in discussing the legal and factual merits of a case [citation], it is improper to misstate the law. [Citation.]"' [Citation.] In particular, it is misconduct for counsel to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements. [Citation.]" (*People v Katzenberger* (2009) 178 Cal.App.4th 1260, 1266 [misconduct where prosecutor illustrated reasonable doubt as jigsaw puzzle with pieces missing].)

Here, the prosecutor did not misstate the reasonable doubt standard, conflate the reasonable doubt standard with common sense, or attempt to absolve the prosecution from its burden of proving defendant's guilt beyond a reasonable doubt. Instead, the prosecutor properly urged the jury to *use* common sense in determining whether the

evidence showed defendant was guilty beyond a reasonable doubt. (*People v. Romero* (2008) 44 Cal.4th 386, 416 [prosecutor's argument urging jury "to 'decide what is reasonable to believe versus unreasonable'" and to "'accept the reasonable and reject the unreasonable'" did not lessen prosecution's burden of proof].)

The prosecutor did not trivialize the reasonable doubt standard by comparing it to everyday decisions the jurors make. (*People v. Nguyen* (1995) 40 Cal.App.4th 28, 35-36 [comparing the reasonable doubt standard to decisions to get married or change lanes while driving trivializes the reasonable doubt standard].) Nor did the prosecutor argue that common sense and reasonable doubt are one and the same, or urge the jury to use its common sense *as a substitute* for evidence of defendant's guilt. (*People v. Centeno* (2014) 60 Cal.4th 659, 671-672 [argument urging jury to accept what was reasonable but not informing the jury it must be convinced that all the necessary facts were proven beyond a reasonable doubt lessened the People's burden of proof because it "left the jury with the impression that so long as [the prosecutor's] interpretation of the evidence was reasonable, the People had met their burden."].)

Additionally, the instructions made clear to the jury that the prosecution had the burden of proving defendant guilty beyond a reasonable doubt; that the jury had to find defendant not guilty unless the evidence showed he was guilty beyond a reasonable doubt (CALCRIM No. 103); and that the jury had to follow the law as the court explained it, even if the jurors believed the attorney's comments conflicted with the court's instructions on the law (CALCRIM No. 200). "'"Jurors are presumed to be intelligent,

capable of understanding the instructions and applying them to the facts of the case."' [Citations.]" (*People v. Carey* (2007) 41 Cal.4th 109, 130.)

For all of these reasons, it is not reasonably likely that the jury interpreted the prosecutor's "common sense" argument as reducing the People's burden of proof. To prevail on a claim of prosecutorial misconduct based on remarks to the jury, there must appear a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. (*People v. Shazier* (2014) 60 Cal.4th 109, 127-128.) The prosecutor's appeal to the jury to use their "common sense" in evaluating the evidence of defendant's guilt did not misstate the law of reasonable doubt, did not lessen the prosecution's burden of proof, and was not misconduct.

(b) *The Prosecutor's "Graphic and Prolonged" Description of Lucero's Death*

Defendant argues the prosecutor committed misconduct by engaging in a "graphic and prolonged" description of Lucero's last moments of life. During his closing argument, the prosecutor described Lucero's last moments of life and several times asked the jury to imagine Lucero's thoughts and suffering:

"As the gunshots go off, Mr. Lucero is woken up by the loud noise. He was startled by it. He jumps up and immediately collapses to the ground, trying to breathe, struggling to breathe. He's able to. Remember he didn't suffocate. That's not what killed him. . . . You can imagine the horror when he realized he'd been shot. He laid

there on the ground, Mike Booth attended to him until his girlfriend [Zuniga] came back from getting help. You can imagine that desperate glimmer of hope he had.

"Mike and [Zuniga] tried to lift him up. So, sure, he thought, maybe they can help me. Maybe they can do something for me. And then a few minutes [later] the paramedics show up. The paramedics save people's lives. The same desperate glimmer of hope. They'll know what to do, how to fix me. They're just as powerless over the situation as Mike Booth and [Zuniga] were.

"So he suffered, trying to breathe. But he didn't know that each heartbeat was killing him, because with each beat of his heart, the heart is doing what it's suppose[d] to do, but it's torn apart. It was spilling out blood. He was slowly bleeding to death.

"You can imagine the next glimmer of hope he had in the ambulance ride to get to San Antonio Hospital when he was taken to the ER.

"Okay. So [Zuniga] and Mike [Booth] couldn't help me, the paramedics couldn't help me, these are doctors, surgeons. They can help me. You can imagine hanging on for that. The doctor said there's nothing we can do. You can imagine the horror as he lied there, just waiting for impending death.

"I want to stop for a moment (indicating). That was 30 seconds that I stopped talking for. Anthony Lucero endured that a hundred and ten times while he struggled to breathe. It took him 55 minutes—55 minutes to die. And for what? For what? For what? Because some drug addict got it in his head he was somehow standing in the way of him seeing his daughter. So senseless.

"So, ladies and gentlemen, based on the evidence that you've been presented and the application of the law to the evidence, I will be asking you to find the defendant guilty of first-degree murder."

As defendant argues and the People concede, it is improper for a prosecutor to appeal to the passions of a jury by asking it to view the crime through the eyes of the victim, or ask "the jurors to imagine the thoughts of the victims in their last seconds of life." (*People v. Leonard* (2007) 40 Cal.4th 1370, 1407, fn. omitted; *People v. Stansbury* (1993) 4 Cal.4th 1017, 1057 [appeal for sympathy for the victim is out of place during an objective determination of guilt]; *People v. Vance* (2010) 188 Cal.App.4th 1182, 1199-1200 [victim impact evidence is only proper in penalty phase of capital trial].)

Still, the People argue that defendant has forfeited this claim of prosecutorial misconduct because defense counsel did not object or request a curative admonition, and an admonition would have cured the error. (*People v. Stansbury*, *supra*, 4 Cal.4th at p. 1056.) Setting aside the question of forfeiture and defendant's related claim that his counsel rendered ineffective assistance in failing to object, we conclude that the misconduct was harmless under the applicable *Watson*[2] standard of reversible error. (*People v. Stansbury*, *supra*, at p. 1056; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1250.) There is no reasonable probability that defendant would have realized a more favorable result, including acquittal or a hung jury, had the prosecutor not discussed Lucero's last moments of life. Though the discussion of Lucero's last moments of life

[2] *People v. Watson* (1956) 46 Cal.2d 818.

improperly appealed to the jury's passions, it was not the central focus of the prosecutor's argument. Moreover, ample evidence showed that defendant was the person who shot and killed Lucero.

As the prosecutor emphasized, Vincent and Raquel Barton identified defendant as "poking around" the abandoned house just before the shooting, and Cervantes identified defendant as fleeing the scene of the murder just after she heard gunshots. All three of these witnesses identified defendant at trial. Raquel also identified defendant from a six-pack photographic lineup on the day of the murder, and Vincent and Cervantes identified defendant from live lineups months after the murder.

The evidence also showed that defendant tried to construct an alibi by calling Hannifin from jail following his July 31, 2013 arrest for the murder and telling Hannifin he was with her on July 26 and 27. Hannifin denied defendant was with her at any time on July 27. Defendant also claimed he was in three *other* places at the time of the shooting—in the homes of (1) his aunt and uncle, Edwards and Santellan, (2) his best friend Danielle, and (3) his girlfriend Blanco. As the prosecutor argued, each of these alibis was discredited, and defendant was "calling a lot of people" in an attempt to find an alibi.

Defendant also had a motive to kill Lucero—his belief that Lucero was preventing him from seeing his daughter S. and rekindling his relationship with Zuniga. Defendant and Lucero got into a fight around one year before the murder, and defendant told Lucero he would kill him if he ever saw him again. Zuniga's admission to her mother showed

defendant was the person who shone the flashlight into the abandoned house two nights before the murder, through the same side window through which the shot that killed Lucero was later fired.

(c) *Disparaging Defense Counsel*

Lastly, defendant claims the prosecutor improperly disparaged defense counsel by suggesting he was fabricating a defense. Here, we find no misconduct.

During his closing argument, defense counsel criticized the reliability of the eyewitness identifications of defendant, among other prosecution evidence, and alternatively argued that if defendant was the shooter he was at most guilty of voluntary manslaughter based on heat of passion. In rebuttal, the prosecutor argued:

"Now, they're also throwing out, well, it was in the heat of passion. Voluntarily [*sic*] manslaughter, not murder. Okay. Now, the tactic, combined with those things the defense is using, is also a legal term for [w]hat lawyers use. Ladies and gentlemen, we call that the spaghetti defense. [¶] The spaghetti defense basically means that you take a bunch of different stuff, like [you] would . . . a plate of spaghetti . . . . You take that spaghetti with all the different things on it and basically the Defense, takes it and chucks it at all of you. And the hope is that something sticks on at least one of you. [¶] Maybe it's a stray piece of pasta, a meatball, maybe some sauce sticks on one of you and causes you to think that there's some issue here, in term[s] of reasonable doubt. But there is no issues [*sic*] here. [¶] The fact the . . . Defense would argue two completely contrary theories with regard to their case smacks with desperation.

"Now, let's talk about the issues that Defense brought up. . . . [¶] Ladies and gentlemen, it goes back to England. . . . In England the big sports for the aristocrats was hunting, right? And so what they would do is have [a] predetermined direction and release the fox and then after some period of time the hunters would release the hounds and the hounds will chase after the fox. And they make a sport out of that. [¶] They chase the fox and hunting the fox. Well, you know, like a lot of specific dog breeds, the hounds they would use to hunt the fox, they bre[e]d them specifically for that purpose. The hounds were best for catching [a] fox. Those are the ones they would breed. So overtime [*sic*], over generations, you wound up with hounds that were so good at fox hunting that it really wasn't a sport any more, because the hounds were that good. It was too easy for them. It wasn't sporting anymore. [¶] So what the hunters began doing, before they would release the fox, is they would take strips of fish[,] strips of red fish, red herrings and they would toss those around the track because it would throw off the scent of the dogs. [¶] . . . [¶]

"Now, back to the red herring. . . . So hunters would throw the red herrings in the areas they expected the fox would run to try to get away from the hounds and the red herrings would throw off their sense of smell. [¶] The reason they did that was because it would make it more sporting. Without them, it wouldn't be fair. [¶] Ladies and gentlemen, that is exactly what the Defense has been doing in their argument with regard to the facts of this case." The prosecutor later returned to the "red herring" theme: "Ladies and gentlemen, ultimately, the every [*sic*] last issue the Defense brought up with

you are red herrings. They're meant to distract you. They're meant to make this sporting. They're meant to confuse you."

The prosecutor concluded his rebuttal argument by asking the jury to "uphold your commitment to deliberate over the evidence and find this man guilty as charged. Catch the fox. Thank, you."

Although a prosecutor is accorded wide latitude in attacking the defense's case (*People v. Gamache* (2010) 48 Cal.4th 347, 390), it is improper for a prosecutor to claim that defense counsel does not believe in his or her client's innocence (*People v. Edwards* (2013) 57 Cal.4th 658, 740). ""A prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel." [Citations.] "In evaluating a claim of such misconduct, we determine whether the prosecutor's comments were a fair response to defense counsel's remarks" [citation], and whether there is a reasonable likelihood the jury construed the remarks in an objectionable fashion [citation].' [Citation.] '. . . [W]e "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.' [Citations.]" (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1336-1337.)

It is not reasonably likely the jury understood the prosecutor's discussion of the "spaghetti defense" or his references to fox hunts and red herrings as impugning the character of defense counsel or as suggesting counsel did not believe defendant was innocent and was fabricating a defense. The rebuttal argument that the heat of passion defense "smack[ed] of desperation," and calling defense counsel's various arguments

about the facts and the evidence "red herrings" that were "meant to distract" or "confuse" the jury, were fair responses to defense counsel's closing remarks.

Defendant relies on *Seumanu*, where the prosecutor committed misconduct and "crossed the ethical line" by suggesting that defense counsel did not personally believe in his client's innocence and was presenting a "sham" defense. (*People v. Seumanu, supra,* 61 Cal.4th at p. 1337.) The prosecutor in *Seumanu* argued that defense counsel "knew" the defendant was the shooter and knew the jury knew the defendant was the shooter. (*Ibid*.) No similar argument was made here. Instead, the prosecutor properly argued that defense counsel's arguments showed the defense was desperate and that defense counsel was trying to confuse and distract the jury with "red herrings" or unimportant facts.

IV

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

RAMIREZ
P. J.

MILLER
J.